> Without meaningful information on Form 396, petitioners to deny will be guided only by the tiny beacon of information provided by Form 395. Most national civil rights organizations, including LULAC, try hard not to target a broadcaster based solely on its low "numbers", because, like the FCC, we look to EEO efforts as the best evidence of genuine EEO compliance. If "EEO Streamlining" happens, LULAC will still do its best to target the guilty and excuse the innocent. But if petitioners to deny are given only numbers to go by, it's inevitable that some broadcasters, innocent of EEO noncompliance, will be caught up in the net of good faith petitions to deny.
>
> Furthermore, the higher costs of operation, and greater inefficiencies of operation imposed on community groups by the absence of EEO data, as shown above, will spill over onto broadcasters. Referrals from community groups are free. A reduction in these referrals will impose greater labor search costs on all broadcasters, depriving them of ready access to a broad spectrum of talent.
>
> Finally, the greater incidence of discrimination in the industry will inevitably discourage good and talented people from seeking careers in the field. This brain drain from broadcasting will most seriously burden EEO compliers, who genuinely desire to take advantage of all sources of talent irrespective of race.

8. Broadcast listeners and viewers

By promoting diversity and ensuring that broadcast licensees have good character, the EEO Rule's ultimate purpose is to protect broadcast listeners and viewers. Eduardo Peña states in his Declaration (Exhibit 10):

> The FCC's EEO program is intended to provide diversity of voices by insuring that the staffs of broadcasting stations are integrated. Every human resources professional knows that the stream of ideas derived from a business organization is the mixture of the ideas contributed by its tributary persons, the employees. The Supreme Court realizes this too. NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

More discrimination and a reduction in minority employment virtually guarantee the resegregation of the airwaves. Anyone listening to the national disgrace called "talk radio" can hardly disagree that a greater diversity of viewpoints, and particularly the addition of minority viewpoints, would benefit our nation's public discourse.

With the loss of the minority ownership policies, the reduction-in-progress in the number of minority owned stations, and the media concentration being spawned by the Telecommunications Act, the FCC's only remaining pro-diversity protection is the EEO Rule. Thus, the Streamlining NPRM should have recognized and sought comments on the burdens faced by members of the public -- the listeners and viewers -- who desire, expect and deserve to receive the full fruits of the First Amendment from their government-licensed radio and television spectrum.

* * * * *

IV. A Critical Purpose Of EEO Enforcement Is Redressing The Present Effects Of Past And Present Discrimination

A. The Commission has ratified, validated and tolerated discrimination by its licensees, contributing enormously to the exclusion of minorities and women from broadcasting

The Commission, and no one else, is the custodian of the fundamental right to communicate. Congress made it so: under the Communications Act, the Commission is expected to provide for the "larger and more effective use of radio in the public interest," 47 U.S.C. §303(g) (1934).

The Communications Act originally provided that the FCC was to provide wire and radio service "to all the people of the United States." 47 U.S.C. §151 (1934). In case there was ever any doubt about who "all the people" included, the Telecommunications Act of 1996 added the words "without discrimination on the basis of race, color, national origin, religion or sex". 47 U.S.C. §151 (1996).

If the Commission had openly held that minorities and women were barred from obtaining broadcast licenses, remedial steps would be justified.142/ The Commission did in fact bar minorities and

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142/ Assistant Attorney General Patrick has declared that "[t]he need to remedy the effects of past discrimination by a state government undoubtedly constitutes a compelling interest." Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 16. See Wygant v. Jackson Board of Education. 476 U.S. 267, 286, rehearing denied, 478 U.S. 1014 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (observing that "[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.")

[n. 142 continued on p. 142]

women from obtaining broadcast licenses, and it did so in a most subtle and invidious way: by ratifying and validating the intentional, de facto and sometimes de jure discrimination of its licensees. This was done with full awareness that that the consequences of that discrimination must inevitably include the denial of broadcast service, broadcast job opportunities, and broadcast entrepreneurial opportunities for minorities and women.143/

The FCC did little to counter that discrimination, even though its character qualifications standards should have prevented the licensing of discriminators. Thanks to a very long and sordid history, during which the FRC and FCC awarded licenses and license renewals to segregated and discriminating licensees, two generations of minorities were denied an opportunity to obtain training needed to succeed in the business.

142/ [continued from p. 141]

The level of equal protection analysis applicable to state actors now also applies to federal actors. Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995) ("Adarand"). Justice O'Connor's majority opinion in Adarand recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it." Id. at 2117.

143/ The fact that the FCC's discriminatory actions were performed indirectly does not render them any less constitutionally invidious. For example, in the higher education context, "even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State's prior de jure segregation and that continues to foster segregation. The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination.' Lane v. Wilson, 307 U.S. 268 (1939). If policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices" (emphasis in original). U.S. v. Fordice, 505 U.S. 717, 729 (1992) ("Fordice").

A recent law review article points out how this discrimination functioned in the process of licensing new facilities. Antionette Cook Bush and Marc S. Martin explain that

> the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s - years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC's comparative hearing procedure contained an inherent bias in favor of nonminorities until reforms were finally adopted in 1978. (fns. omitted; emphasis supplied).

Antionette Cook Bush and Marc S. Martin, in "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Federal Comm. Law Journal 423, 439 (1996) ("Bush and Martin"). Applicants for new broadcast licenses found that broadcast experience was necessary in order to obtain bank financing -- which, under the Ultravision rule, had to be sufficient to finance construction and a full year of broadcast operation with zero revenue.144/ The Fowler Commission quite properly repealed Ultravision, finding that it "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses."145/

144/ Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision").

145/ Financial Qualifications Standards, 87 FCC2d 200, 201 (1981).

Even a self-financed applicant would find that broadcast experience and "past broadcast record" were valuable and often determinative comparative criteria in these hearings. Even now "past broadcast experience" is enough to swing the grant from a minority to a nonminority in a comparative case. See, e.g., Great Lakes Broadcasting, Inc., 8 FCC Rcd 4007, 4010 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett).

How could minorities obtain "broadcast experience" or "past broadcast record"? Certainly not in the customary manner -- attending a university whose broadcasting department operated an FCC-licensed noncommercial TV or FM training facility. Minorities were barred by state law from attending these schools.146/ Yet the FCC routinely provided, then renewed, broadcast licenses for these segregated institutions, thereby guaranteeing that a generation of trained broadcast employees in their states would be Whites only.147/ By doing so, the FCC deliberately afforded state segregation laws precedence over the nondiscrimination requirement of Section 151 of the Communications Act -- a bizarre inversion of McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed 579 (1822).

On top of this, the FCC routinely renewed, without investigation, the licenses of commercial stations which the FCC had to know were engaging in deliberate employment discrimination.

146/ Black colleges were not a viable alternative, because state legislatures denied Black colleges the funds to start broadcasting programs or to apply for broadcasting station licenses.

147/ Examples include WBKY-FM, University of Kentucky, licensed in 1941, WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1957. There were dozens of others, both public and private.

The reason the FCC "had to know" is that, as an expert agency, it is presumed to be familiar with the policies of its licensees. FCC commissioners regularly speak to state broadcast associations. Some of the commissioners must have noticed that no Black persons were in attendance at these meetings, even in the capacity of station staff. They must have noticed, when visiting licensees' facilities, that no Blacks persons worked there. Even if they didn't notice, they certainly must have noticed that, until the 1960's, the FCC's own staff was all-White except at the secretarial and janitorial levels. That couldn't have happened unless the regulated industry and the broadcast training schools, from which the FCC drew the bulk of its staff, were segregated, or unless the FCC itself discriminated in employment -- or both.

One might think that the Commission's "character qualifications" test, long part of the "public interest" standard in Sections 307 and 309 of the Communications Act, would have required the denial of segregationists' broadcast applications on character grounds. Incredibly, the reverse was true. Faced with an irreconcilable conflict between its own law and state segregation laws, the Commission gave full faith and credit to the state segregation laws.

This bizarre and probably unique inversion of federal supremacy was articulated in Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) ("Southland"). The Commission had to decide which of three applicants would be granted a construction permit which would confer -- for free -- millions of dollars of spectrum space to be used to construct a VHF television station in Shreveport.

One of the applicants, Southland Television, was headed by Don George. Mr. George's business was movie theater ownership. Louisiana law governing movie theaters assumed that the theaters had two stories, like the 19th century opera houses on which they were modelled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race.148/

Mr. George did not want Blacks to patronize his theaters at all. Ironically, he was hampered by the literal language of the Louisiana movie theater segregation law. To circumvent the law, he built Louisiana's first one-story movie theaters, and operated Louisiana's only Whites-only drive-in theaters.149/

One of the competitors for the license, Shreveport Television, was the first broadcast applicant to include Black stockholders. Shreveport Television noted that Mr. George's application contemplated construction of a studio for live broadcasts. Shreveport Television asked the Commission to disqualify Mr. George's company from holding a broadcast license because, based on Mr. George's history of movie theater operations, he could be expected to deny Blacks the opportunity to be seated in the studio audiences of live productions at the television station.150/

148/ The law was thought at the time to be race-neutral because the theater owners, rather than the state, decided which race was consigned to which story of the theaters. But every Black person over 40 remembers which story was the "Black" story.

149/ Other Louisiana drive-in theaters enforced segregation only within each automobile, to discourage miscegenation.

150/ Since videotape was not invented until 1956, television broadcasts were done before live audiences, in studios set up to resemble miniature movie theaters. Southland Television proposed to have a balcony in its studio.

The Commission was unmoved. It held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theaters, nor any evidence that "such admission would be legal under the laws of that state." Id., 10 RR at 750. Thus did the Commission give full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state laws permitting some integration.

In the 1960's, the civil rights movement hardly left the Commission untouched. But the Commission's response to the cry for freedom reflected timidity and hostility, in stark contrast to the forthright efforts of other agencies of the Kennedy and Johnson administrations.

The first test of where the Commission stood on civil rights came in Broward County Broadcasting, 1 RR2d 294 (1963) ("Broward County"). The case involved a new AM radio station, WIXX. The station was licensed to and situated in Oakland Park, a suburb adjacent to Ft. Lauderdale. The substantial Black population of Ft. Lauderdale received no Black oriented programming from any station. Consequently, WIXX decided to devote its program schedule to Black-oriented news, public affairs and music. Id. at 296.

The City of Oakland Park complained to the Commission that WIXX was offering a format which the city did not need or want because "the Negro population to be catered to all reside beyond the corporate limits of Oakland Park." Id. at 294. The city government was fearful that Black professionals, once hired by WIXX to produce its programming, might choose to buy homes near their jobs.

Obviously, the Commission had no business regulating program formats.151/ Instead, it threw the station into a revocation hearing in which it could have lost its license. The station's crime was that it had changed its programming plans from the "general audience" schedule originally proposed in its licensing application -- a "character" violation.

Faced with the probable loss of its license, the station dropped most of its Black programming. The Commission thereupon quietly dropped the charges -- proving that its interest wasn't the licensee's "character" at all, which could hardly have been mitigated by "compliance" after a hearing was designated.

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) ("Columbus"), the Commission was faced with a radio licensee who had used his station "to incite to riot...or to prevent by unlawful means, the implementation of a court order" requiring the University of Mississippi to enroll James Meredith.

151/ Eighteen years later, the Supreme Court held that the Commission may not regulate program formats. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). But even in 1963, the Commission had only rarely sanctioned a licensee for offering one format over another. The only other reported cases arose in the late 1930's. Blissfully unaware that World War II was about to occur, and filled with the anti-semitism rampant at the time, the Commission denied three applications by the only applicants for their respective radio licenses because the applicants proposed to broadcast some of their schedules in "foreign languages" -- code for Yiddish, the language commonly used by Jewish refugees from Germany and Poland. In Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), the Commission held that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group...the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936) and Voice of Brooklyn, 8 FCC 230, 248 (1940). Thus, under the Commission's pre-World War II jurisprudence, none but WASPs could hope for access to the public airwaves.

After President Kennedy federalized the National Guard in anticipation of violence on Mr. Meredith's fourth attempt to enroll, the radio station called upon its listeners to go to Oxford and assemble to prevent Mr. Meredith's enrollment. Hundreds answered the call, and two people died in the ensuing riot.

However, the Commission merely "admonished" the station, ignoring the obvious fact that broadcast licenses are not awarded so they can be used to incite riots. Illustrating how out of step the Commission was with the federal government's civil rights policies of the day, the losing complainant in Columbus was none other than the Federal Bureau of Investigation, then headed by that great friend of civil rights, J. Edgar Hoover.

The federal courts soon lost patience with the Commission's racist policies. In UCC I, 359 F.2d at 994, the Court of Appeals ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council's viewpoint on civil rights. WLBT-TV went so far as to censor its own network news feeds with a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed. Id. at 998.

After an overwhelmingly one-sided hearing, the Commission renewed WLBT-TV's license again. On appeal again, the Court ordered the Commission to deny WLBT's license renewal. The Court had never before taken such an action, but this time it held the

administrative record to be "beyond repair." UCC II, 425 F.2d at 550.[152]

The Commission's new antidiscrimination policy -- imposed by the court in UCC II -- was applied haltingly and sporadically. In Chapman, 24 FCC2d at 282, the Commission had before it several applicants seeking construction permits to operate on Channel 21 in Birmingham, Alabama. One applicant, Alabama Television, had as a 16.2% stockholder John Jemison. Mr. Jemison, who owned a Birmingham cemetery, had participated in the cemetery's 1954 decision to continue its policy, adopted in 1906, of excluding Blacks.

The cemetery's policy came to light when the cemetery turned away the body of a Black soldier killed in Vietnam. Yet the Commission found "extenuating circumstances" in the applicant's claim that the cemetery would have been sued by White cemetery plot owners.[153] Thus, the Commission ordered a hearing -- but framed the issues to focus only on why the applicant had covered the matter up, not whether a rabid segregationist had the moral character to be a federal licensee. Id. at 284. Even the cover-up

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152/ See Bush and Martin, 48 Federal Comm. Law Journal at 439-440 n. 94 (noting that evidence in the record showed that the FCC was aware that the licensee had "engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology"). The authors cite UCC II as an example of FCC conduct which might fall short of de jure discrimination, but which had the same effect.

153/ Id. at 284. Twenty-two years earlier, the Supreme Court had ruled that restrictive covenants were unenforcable. Hurd v. Hodge, 334 U.S. 24 (1948) ("Hurd"). Hurd involved housing. Occupants of houses are typically more likely than occupants of cemeteries to be concerned about their neighbors' race. A fortiori, the Commission's holding in Chapman was ridiculous.

allegations were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges." Chapman Radio and Television Co., 21 RR2d 887, 895 (Kraushaar, Examiner, 1971).

Southland, discussed above, was one of the first television comparative hearings, and Chapman was among the last. Today, all of the television spectrum in the United States has long since been handed out. Minority owned companies received exactly two of these free television licenses. In effect, the Commission presided over a 100% set-aside for Whites. That is why today's Commission, seeking to enable at least a few minorities to own stations, is compelled to focus on opportunities for minorities to buy their way in. See Market Entry Barriers.

By the time the Commission adopted the EEO Rule, the ownership and management structure of the industry was firmly entrenched in the hands of White males, a condition which persists almost unchanged to this day.154/ This condition still prevents

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154/ Even in its implementation of the EEO Rule, the Commission still continued to ratify and validate the discriminatory practices of its licensees. Although it is inconceivable that only three licensees discriminated in employment between 1969 and 1996, only three licensees have ever been the subject of findings that their discriminatory actions would justify the loss of their licenses. See p. 106 n. 130 supra. Only one license has actually been taken away because of (religious) discrimination, in King's Garden (MO&O), 34 FCC2d at 237. The development of the Commission's EEO jurisprudence has come largely as a result of court decisions, including Beaumont, 854 F.2d at 501; NBMC, 775 F.2d at 342; Bilingual II, 595 F.2d at 621; BBC, 556 F.2d at 59, and of course UCC III, 560 F.2d at 529.

[n. 154 continued on p. 152]

minorities and women from having access to the mentoring, training and career development opportunities which would allow them to achieve their full potentials even if present-time intentional discrimination disappeared this afternoon.

154/ [continued from p. 151]

Beaumont, 854 F.2d at 501, provides a classic example of the Commission's behavior in handling EEO allegations. In 1981, Pyle Communications, which owned KIEZ(AM) and KWIC-FM in Beaumont, Texas, changed KIEZ's format from Black to country and western. Pyle then fired the Black members of the staff -- even the secretaries and salespeople -- without giving them a chance to try out in the new format. At first, Pyle told the Commission that the Black employees had left voluntarily. However, the NAACP used Pyle's own payroll records to show that every time a Black employee had "resigned", a White person had been hired that day or a day earlier to do the same job. Confronted with this evidence, Pyle changed its story, maintaining that the Black employees had been incompetent. Id. at 505. The Commission accepted Pyle's second version of the facts and refused to hold a hearing. The Court of Appeals had little difficulty reversing and remanding for trial, holding that Pyle's conflicting stories should have tipped off the Commission to possible race discrimination.

Another classic example of the Commission's difficulty in prosecuting discriminators involved a case which did result in a finding of intentional discrimination. The case involved 250 watt station WBUZ(AM) in Fredonia, New York. Catoctin, 4 FCC Rcd at 2553. Catoctin should have been a "no-brainer." In 1980, Henry Serafin, the owner of WBUZ(AM), asked the Buffalo CETA office to send over a secretarial applicant. CETA sent Linda Johnson. Although Ms. Johnson was well qualified, Serafin did not interview her. Instead, he called CETA counselor Cheryl Gawronski and asked "don't you have any white girls to send me?" adding that Ms. Johnson "would make charcoal look white." Id. at 2555. Yet the Commission inexplicably relied only on Serafin's misrepresentations at trial to deny renewal, holding that his discrimination against Ms. Johnson, and one other factor, "only reinforce the conclusion" that Catoctin was unqualified. The other factor which "reinforce[d]" that conclusion, and which the Commission apparently deemed to weigh the same as discrimination, was WBUZ' failure to award a $200 stereo receiver as a prize in a contest. It took four and a half years from the date of the discrimination for the case to be designated for hearing, and another four years before the license renewal was denied. Id. at 2557-58. The Commission evidently viewed employment discrimination to carry the same policy priority as the fraudulent award of a $200 radio.

As we have shown, the EEO Rule has been amply justified to promote diversity,155/ to ensure the good character of licensees,156/ and to promote minority entrepreneurship.157/ Originally, it was intended as part of the national policy to prevent and remedy racial discrimination,158/ a matter of the "highest priority." Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976). Subsequently, the Commission forgot the importance of this policy.159/ Fortunately, the UCC III court saved the policy, and even if the Commission had amnesia, Congress remembered.160/

155/ See pp. 16-20 supra.

156/ See pp. 20-21 supra.

157/ See pp. 77-80 supra.

158/ Nondiscrimination - 1968, 13 FCC2d at 773-74 (holding that a "national policy" against employment discrimination justified the EEO rule.) See also Nondiscrimination - 1969, 18 FCC2d at 245.

159/ Nondiscrimination - 1976, 60 FCC2d at 229 ("[w]e do not contend that this agency has a sweeping mandate to further the 'national policy' against discrimination....") However, in that same year, the Commission recognized "[a]n affirmative action concept is meaningless unless positive steps are taken to overcome the effects of past discrimination - however inadvertent." Federal (HDO), 59 FCC2d at 365. Thus, the Commission has never completely abandoned its appreciation for the fact that the EEO Rule is part of the mainstream of American antidiscrimination jurisprudence.

160/ "[T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982).

It is time for the Commission to restore the goal of ending discrimination and remedying its present effects as a primary purpose for the EEO Rule. The Commission can and must do this to repair the damage done by its own unfortunate history of encouragement, collaboration, and tangible rewards of spectrum to discriminators.

The objectives of ending discrimination and remedying its present effects, promoting diversity, insuring licensee character and promoting minority entrepreneurship are more than sufficient to justify the EEO Rule -- and to justify EEO enforcement which goes well beyond simply "maintaining effective industry EEO oversight." NPRM, 11 FCC Rcd at 5163 ¶17.

* * * * *

B. Reductions in nondiscrimination protections would violate the Due Process Clause of the Fifth Amendment

We have shown that the Commission should adopt stronger EEO enforcement procedures to remedy the damage caused in significant part by its own past involvement in discrimination. See pp. 141-154 supra. In addition, as shown in this Section, the NPRM's proposed evisceration of the only meaningful protections against discrimination in broadcasting would be unlawful. Substantially reducing or eliminating these protections would violate the equal protection and due process rights of minorities and women.161/

In its discussion of the Haley, Bader & Potts Petition for Rulemaking, whose implied premise is that EEO enforcement inhibits opportunities for White males to work in broadcasting, the NPRM correctly recognizes that the EEO Rule does not diminish the equal protection or due process rights of White males because it is an efforts-based initiative that does not mandate that broadcasters hire on the basis of race. Id. at 5161-62 ¶¶13-15.162/ In

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161/ Federal equal protection violations are redressed through the Due Process Clause of the 5th Amendment, whose scope is contiguous with the Equal Protection Clause of the 14th Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954) ("Bolling") (ordering desegregation of the D.C. public schools when D.C. was federally governed). We have developed a jurisprudential analogy to 14th Amendment Equal Protection in the school context. That jurisprudence tracks 5th Amendment Due Process in the same context. Id.

162/ This is a peculiar subject for serious debate, since:

- Every chief executive officer of every leading television network, radio network, cable MSO, station group, film studio, satellite company, broadcast tower company, syndication, TV and radio production or distribution company, music recording or distribution company, tower company, audience rating company, major advertiser or broadcast industry trade publication is a White male.

[n. 162 continued on p. 156]

addition, the Commission should expressly recognize that an end to meaningful efforts by the FCC to remedy the consequences of its own past discrimination-ratifying behavior would directly offend the Due Process Clause of the Fifth Amendment, which operates congruently with the Equal Protection Clause of the 14th Amendment. See n. 161 supra.

A 14th Amendment Equal Protection or 5th Amendment Due Process analysis must begin by articulating precisely the nature of the right being curtailed by government action.163/ The right being curtailed here is equal access to meaningful participation in

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162/ [continued from p. 155]

- Minorities do not own a significant share of any of these corporations.
- Each of the twenty-three chairs of the FCC has been a White male. Fifty-five of the 67 past and former members of the FCC have been White males.
- Every person who has ever headed the Commerce Committee or Communications Subcommittee of either the House or the Senate is a White male.
- All but one of the Washington lobbyists for major communications companies are White males.
- All of the approximately 150 media brokers in the United States except one (who works alone and handles only Spanish radio transactions) is White; only three are women.
- White males have run every major broadcast talent placement firm except one, which was run by a White woman who passed away recently.
- White males run every major communications law firm, and run every mid-sized communications law firm but two.
- White males control every major financial institution lending money for major media acquisitions and transactions. Everyone who can greenlight an eight figure broadcast deal is a White male.

163/ Railway Express Agency v. New York, 356 U.S. 106, 110 (1947).

the stream of mass communications, both as creators and consumers. This right enables significant identifiable groups, whose members have been targeted for discrimination because of their membership in the group, to enjoy the same opportunities as other groups enjoy to create, transmit and interact[164/] with mass-distributed information, cultural content,[165/] and opinion. We refer to this

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164/ The interactive nature of mass communications was recognized in Waters Broadcasting Corp., 91 FCC2d 1260 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) ("Waters"). In Waters, the Commission awarded a decisionally significant minority enhancement to the ownership integration proposal of a Black woman who proposed to serve a nearly all-White community. The Commission held that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." Id. at 1265. Thus, Waters validated the fact that communication between minorities and nonminorities, rather than just communication within a minority group, is an essential aspect of the diversity-promoting goal of the comparative hearing process. See also Dr. Martin Luther King Movement v. Chicago, 419 F.Supp. 667 (N.D. Ill. 1976) (emphasizing that Blacks' need for access to a White audience requires a municipality to permit a civil rights march in a White neighborhood).

165/ It is essential that cultural content be included with the scope of equal protection and due process in the media. Although the Commission's diversity jurisprudence has focused largely on informational, public affairs and instructional content, see, e.g., NAACP v. FPC, 425 U.S. at 670 n. 7, Deregulation of Radio, 84 FCC2d at 975, it is cultural broadcast content which most influences and mediates social norms. The inclusion of culture among the elements of media content affecting due process or equal protection rights may be analogized to the inclusion of cultural (as well as athletic) activities in the scope of educational opportunities covered by desegregation decrees. Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I") held that education is "a principal instrument in awakening the child to cultural values." Id. at 493. Courts have not wavered in requiring the integration of school bands and orchestras, sporting events and extracurricular clubs. See, e.g., Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690, 696 (5th Cir. 1968) (declaring that failure to schedule games between all-Black teams against all-White teams "is no longer tolerable; the integration of activities must be complete.") Similarly, the Commission should not waver in including culture within the scope of content triggering due process or equal protection rights in the media.

right by the shorthand term "the Media Participation Right."

The Media Participation Right is expansively defined to accurately reflect the ways in which consumers employ media in their daily lives: as participants in the creation and transmission of content, as recipients of that content, and as respondents to that content.

The Media Participation Right is broader in scope than the "Access Right" which formed the basis for the Fairness Doctrine. The Fairness Doctrine focused only on the role of consumers as respondents to content.166/ The Media Participation Right also includes consumers' role as creators and transmitters of content.

However, the Media Participation Right is easier to enforce than the Access Right. The Fairness Doctrine was meant to be applied microscopically, on a station by station or issue by issue basis.167/ The Media Participation Right applies macroscopically, implicating structural questions (who can own the media) and operational questions (hiring policies). The Media Participation Right is based upon the nexus between ownership structure or hiring

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166/ See Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir.), cert. denied, 493 U.S. 1019 (1989).

167/ Id. The Fairness Doctrine was repealed because the FCC accepted many broadcasters' contention that a potential compulsion to air particular viewpoints chills a broadcaster's exercise of her First Amendment speech rights. See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC2d 143, 161 (1985) (finding that "in net effect" the Fairness Doctrine "often discourages the presentation of controversial issue programming"); Complaint of Syracuse Peace Council, 2 FCC Rcd 5043, 5057-58 (1987) (holding that the "Fairness Doctrine contravenes the First Amendment" and is therefore unenforceable against station); Fairness Report, 2 FCC Rcd 5272, 5295 (1987) (reaffirming decision to repeal Fairness Doctrine, finding that it "contravenes fundamental principles of free speech.")

policies and the diversity of viewpoints[168/] -- a nexus which takes the form of a general inference that marketwide ownership or employment integration will enhance marketwide viewpoint diversity, rather than a specific finding that the integration of employment or ownership of any one broadcast station would inevitably enhance diversity of viewpoints at that station.[169/] Thus, the Media Participation Right would never be applied to demand that a particular broadcaster transmit or abstain from transmitting any particular item of content,[170/] or to instruct a broadcaster to hire a particular person.[171/]

The differences between the Access Right and the Media Participation Right are found in the constitutional provisions they are meant to effectuate. If there is a right of access, it flows directly from the First Amendment.[172/] On the other hand, the Media Participation Right flows from the Due Process Clause of the 5th Amendment (congruent with the 14th Amendment's Equal Protection

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168/ NAACP v. FPC, 425 U.S. at 670 n. 7 (finding a nexus between EEO and diversity of viewpoints); Metro, 497 U.S. at 563 (finding a nexus between minority ownership and diversity of viewpoints). Adarand overruled the aspect of Metro which would apply intermediate scrutiny to race-based policies. Adarand, 115 S.Ct. at 2113. However, Adarand left untouched Metro's finding of a nexus between minority ownership and viewpoint diversity.

169/ Metro, 497 U.S. at 566; see NAACP v. FPC, supra, 425 U.S. at 670 n. 7.

170/ See Metro, 497 U.S. at 566.

171/ See FCC/EEOC Agreement, 70 FCC2d at 2331-32.

172/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("Red Lion").

Clause).[173]

The Media Participation Right is closely analogous to the interests which led the Supreme Court to declare that the government has an affirmative, nondiscretionary duty to bring about the integration of the nation's public schools. Brown I, 347 U.S. at 493.[174] Like the need to eliminate school segregation, the need to eliminate all vestiges of a previously segregated system of broadcasting is a compelling interest requiring federal remedial action.

Our media play at least as critical a role in the socialization and development of our children as do the

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173/ The Courts have not recognized a right of access to broadcasting under the First Amendment. Smothers v. CBS, 351 F.Supp. 622 (C.D. Ca. 1972); see Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). This lack of recognition of a right of access does not implicate the Media Participation Right, which flows not from the First Amendment but from the Due Process Clause of the 5th Amendment, as enhanced by the First Amendment's goal of a robust exchange of ideas. Moreover, the Courts have long recognized that broadcast regulation should advance this First Amendment goal. NBC v. U.S., 319 U.S. 190 (1943). That principle exists independently of whether there is an individual right of access under the First Amendment.

174/ It can be argued that our voting rights jurisprudence provides an even closer analogy to the Media Participation Right than does school desegregation. However, we will never know, because history didn't cooperate. School desegregation came about through a direct confrontation in the courts over the Equal Protection Clause of the 14th Amendment (Brown I) and the Due Process Clause of the 5th Amendment (Bolling). The critical issues in that confrontation were litigated by the federal courts in a cornucopia of equal protection decisions between 1954 and 1964, when Title VI of the Civil Rights Act gave the Department of Health, Education and Welfare the power to withhold financial assistance from segregated school districts. Thereafter, the federal courts' role became focused largely on statutory interpretation. On the other hand, virtually all of our voting rights jurisprudence flows directly from the Voting Rights Act of 1965. Promptly after its enactment, that statute held to be, inter alia, appropriate legislation to enforce the Equal Protection Clause. Katzenbach v. Morgan, 384 U.S. 641 (1966). Thereafter, until very recently, virtually all voting rights litigation has been focused on nonconstitutional, statutory issues.

schools.[175] Like education, the media is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one's civil liberties, and informed participation in the political process.[176] What school desegregation jurisprudence tells us about the importance of public education can also be said about the free broadcast media today: (1) it has traditionally been recognized as vital to the "preservation of a democratic system of government,"[177] and (2) it is necesssary to prepare individuals to be self-reliant and self-sufficient participants in society.[178]

Moreover, the free broadcast media in particular, like public education, serves an essential public function[179] dependent on

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175/ See Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 10-18 (1989) ("Children's Television Act Senate Report").

176/ Blue Book (Federal Communications Commission, 1945) at 4.

177/ Brown I, 347 U.S. at 493; see Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

178/ Brown I, 347 U.S. at 493.

179/ Nobody seriously contends that the nation could survive long without broadcasting -- specifically, free broadcasting. Over-the-air broadcasting, including both television and radio network, local and syndicated programming, has by far the greatest impact upon our society's educational, cultural and political development when compared to all other media outlets, because most people rely upon such programming as their primary source for information and entertainment. In fact, our system of product and service marketing, and our culture, are entirely dependent upon it. More important, our political system depends on it: Section 315 of the Communications Act presumes the existence of free broadcasting as a critical component of the democratic system. Red Lion, 395 U.S. at 389. Indeed, when the federal government was shut down in January, 1996, leaving only "essential" (e.g. National Security) employees on the job, the Mass Media Bureau was expected to maintain a skeleton staff to ensure that the nation's broadcasting infrastructure would continue to operate.

government for its existence.[180] Just as the presence of schools some may attend for a fee does not relieve the government of its duty to cause the integration of the ubiquitous free public schools,[181] the presence of media that some may purchase for a fee does not relieve the government of its duty to cause the

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180/ U.S. v. Zenith Radio Corp., 12 F.2d 614 (D.C.N.D. Ill. 1926) ("Zenith Radio").

In adopting the EEO Rule, the Commission noted that "it has been argued that because of the relationship between the government and broadcasting stations, 'the Commission has a constitutional duty to assure equal employment opportunity.'" Nondiscrimination - 1969, 18 FCC2d at 241. The Commission identified Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Burton") as a citation which had been given in support of that proposition. Id. at n. 2.

The party which had made this argument in 1969 was none other than the Department of Justice. The Department argued that "the use of the public domain would appear to confer upon broadcast licensees enough of a 'public' character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discrimination on the grounds of race, color, or national origin. (See Burton v. Wilmington, 365 U.S. 715 (1961))." Letter to Hon. Rosel Hyde from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, May 21, 1968, found in Nondiscrimination - 1968, 13 FCC2d at 776. The Department was absolutely correct. Indeed, the case for federal enforcement of due process or equal protection rights in broadcasting is even stronger than the case for enforcement of those rights in Burton. Burton involved a luncheonette which (owing to its location in a municipal building) could not have existed absent state action, but which was not essential to the performance of the state's functions. Free broadcasting cannot exist absent state action (Zenith Radio) and it is essential to the performance of the state's functions (see n. 179 supra).

181/ Griffin v. Prince Edward County Board of Education, 377 U.S. 218 (1964) ("Griffin") (rejecting school board's plan to close the public schools to avoid compliance with school desegregation decree). See also Poindexter v. Louisiana Financial Commission, 274 F.Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968) (rejecting state's plan to finance private schools to avoid school desegregation decree).

integration of the ubiquitous free media.[182]

The FCC's role as the champion and protector of 5th Amendment Due Process rights may be found in the Communications Act's command that broadcasting be made available "to all the people of the United States," 47 U.S.C. §151 (1934) (emphasis supplied), a directive recently amended by the Telecommunications Act's command that broadcasting be made available "without discrimination on the basis of race, color, national origin, religion or sex", 47 U.S.C. §151 (1996). The FCC's 5th Amendment remedial powers may also be traced to Section 303(g) of the Communications Act, which requires the Commission to provide for the "larger and more effective use of radio in the public interest."

Just as the Brown I court imposed affirmative remedial duties on government because it found education to be nearly a fundamental right,[183] the Commission today must accept affirmative remedial duties because access to the stream of communications is nearly a

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182/ See FCC v. NCCB, 436 U.S. 795 (1978) (commenting that the existence of cable, newspapers, and the like does not remove the need for the FCC to supervise the ownership structure of the broadcasting industry).

This analysis might lead some to infer that FCC EEO regulation of cable is discretionary, rather than compulsory under the Due Process Clause of the 5th Amendment. However, cable is so ubiquitous as a means of transmitting free media that an equal protection-driven policy applicable to free media must apply to cable as well. See Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445 (1994) ("Turner"), discussed at p. 164 n. 184 infra. This is only a theoretical question, inasmuch as FCC EEO regulation of cable is not discretionary because Congress has insisted upon it in the Cable Act of 1992. 47 U.S.C. §634 (1992).

183/ Brown I did not hold that education is a "fundamental" right, but it came close. Id. at 493 (education is "the very foundation of good citizenship"). The near-fundamental nature of education is manifest from the existence of compulsory education laws in every state. Id.